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## THE NATION AND THE RAILWAYS

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BY STUYVESANT FISH,  
New York

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Our country is pre-eminently the railroad country of the world. For over fifty years we have had more miles of railroad in operation than all Europe. In those well-settled countries the building of railways simply provided a cheaper and better means of handling an existing traffic. For us they have made a wilderness habitable, rendered its settlement and civilization possible, and created the traffic which they now carry. The amount of money invested in our railways exceeds that in any other one thing, except lands and buildings, and more of our people are employed in and about the railways than in any other pursuit except farming.

Our railroads, like those in England, have been built by private corporations, organized for that purpose and never by the government. It is said that the words "*periculum privatum, utilitas publica*" appeared on the seal of the first railway company incorporated in England; and with us, as with them, the risk has ever been private, although the benefit as well as the use has been public.

In the United States the building of railroads began in or just before 1830, at the close of which year there were twenty-three miles in operation. The vastness of our territory, the absence of wagon roads, and the inability of the states and the municipalities to build them, made the construction of railroads a prerequisite to the settlement and civilization of the interior. Liberal and perpetual charters, which often carried exemptions from taxation, were freely granted by all the states. Many of them ran largely into debt, and not a few into bankruptcy, in order to obtain these means of creating and developing commerce in what were then waste places.

In order to induce the investment of private capital in the construction of new railroads, the federal government began, in 1850, to make grants of public lands. Within about twenty years (from September 28, 1850, to March 3, 1871) Congress passed acts granting 159,125,734 acres, or 248,634 square miles, of public lands

for that purpose. This exceeds the present area of all the thirteen original states, excepting only South Carolina and Georgia, and is more than five times that of Pennsylvania. Only a part of these enormous grants became available through the actual construction of the railroads.

The need of transportation became such that during and after the Civil War, the federal government also issued its bonds for many millions of dollars in further aid of building new railroads. In the decade from 1860 to 1870 counties and towns bonded themselves in enormous sums to secure the development of their latent resources by the life-giving touch of the railway. Thus far all legislation, federal, state and municipal, has been in aid of the construction of additional railroads.

Down to 1870 our railroads had been operated as private corporations for gain without much if any regard to the public. The sole question seemed to be the profit to the stockholders. Then began the enactment of the so-called "Granger Laws." This was an effort on the part of the several states, each for itself, to reduce charges and secure better service and accommodations. When some states attempted to regulate rates from points within their borders to points in other states, the Supreme Court of the United States decided that no state had such authority, the constitution having granted to Congress the power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It then became necessary for the federal government to act, which resulted in the creation of the Interstate Commerce Commission under the "Act to regulate commerce," passed in 1887.

The act of 1887 forbade the railroads from pooling freight. This took away what had become perhaps the chief incentive to the building of new railroads, and more than any other thing has tended to concentrate the control of the railroads of the United States in the hands of a few. Down to 1870, and a little later, commerce by land "among the several states" had been absolutely free from governmental control, and, so far as the federal government is concerned, remained absolutely free until 1887. However we may differ about a tariff on imports from abroad, no one will question that free trade among ourselves has resulted in upbuilding the wealth and the strength of this nation.

In 1850 the United States already possessed more miles of railroad than England and France put together, and since about 1860 it has at all times had more than the whole of Europe. The granger legislation does not seem to have checked the building of new railroads. For while to the 30,626 miles in operation in 1860 there had been added in the next ten years (before the passage of the granger laws) 22,296 miles, or 72.8 per cent, there were added in the next ten years to the 52,922 miles in operation in 1870, 40,345 miles, or 76.23 per cent; and to the 93,267 miles in operation in 1880 there were in the next ten years added 73,436 miles, or 78.74 per cent. While I would not have you believe that it is wholly due to the efforts of Congress to regulate commerce, I do want to impress upon you the fact that in the next ten years there were only added to the 166,703 miles in operation in 1890, 27,559 miles, or 16.53 per cent. It may be that in 1890 the country already had enough railroads, but you will find difficulty in persuading citizens of localities not served by railroads to agree to that proposition. It seems to me that the legislation by Congress was not so much addressed to regulating commerce by rail, as to curtailing the profits of the business. However this may be, it certainly deterred the investment of fresh money in such enterprises, and thereby restricted the building of new railroads to those directly or indirectly controlled by the existing systems. With the single exception of a railroad from Kansas City to Sabine Pass, on the Gulf of Mexico, which has in the meanwhile been sold under foreclosure of mortgage, I can recall no considerable railroad which has been completed as a new and independent venture since the passage of the interstate commerce law in 1887.

Let us now see how the nation fared in the forty years from the first census taken in 1790 to the introduction of railroads in 1830, and later contrast its growth without railroads during that period with its growth after their introduction. In that period steam had been widely introduced as an efficient force in manufactures and in the propulsion of vessels. In the latter respect the United States already led every other country in the world in 1830. And yet in those years, or rather from 1800 to 1830, our imports of merchandise had fallen steadily at each decennial period from \$91,252,768 in 1800 to \$62,720,956 in 1830, and our exports of merchandise had not grown appreciably, having been

\$70,971,780 in 1800 and only \$71,670,735 in 1830. Concurrently the tonnage of American vessels built had fallen off nearly one-half, from 106,261 tons in 1800 to 58,560 tons in 1830. So also of the tonnage of American vessels in domestic and foreign trade, which, while increasing from 971,840 tons in 1800 to 1,190,983 tons in 1830, showed in the latter year a marked diminution as compared with 1820, alike as to domestic and foreign trade.

We may fairly say that at the genesis of our railroads, in 1830, neither the wealth nor the commerce of the United States was increasing normally. The census reports give no figures as to wealth for the years prior to 1850, but Mulhall estimates that in 1790 the wealth per capita in the United States was \$157.56, and that in 1830 it had risen to \$205.94, showing an increase in forty years of 30.71 per cent. This without railroads.

In 1870 the wealth per capita had grown to \$779.83, an increase in the forty years from 1830 of 278.67 per cent. Twenty years later, in 1890, under restrictions on railroads by state commissions, but still under absolute free trade between the states, the wealth per capita rose to \$1,038.57, showing an increase of 33.18 per cent. In the next ten years, from 1890 to 1900, under the added restriction of legislation by Congress as to railroads, the wealth per capita grew to \$1,164.79, but the ratio of increase in those ten years was only 12.15 per cent. We here see that the greatest ratio of increase in wealth per capita took place coincidentally with the greatest ratio of increase in railroad mileage under absolute free trade among the states; that the ratio of increase in wealth slackened somewhat in the period of the granger legislation, and more decidedly after Congress began to regulate commerce.

In saying this do not understand me as opposed to governmental regulation of railroads, but only as opposed to the form which it has taken in the United States. In so far as regulation by state commissions is concerned their action has, in the West at least, been hostile and generally narrow and selfish.

The regulation by Congress is to be criticised on other grounds. First, in that it has taken a direction which has resulted in repressing instead of stimulating the building of new railroads. Second, in that Congress, instead of regulating the whole business, has taken but part of it. And, third, in that the Interstate Commerce

Commission is an anomalous body of a character not known to or recognized under the constitution.

I.

I have already spoken of the lessened ratio of increase in miles operated since 1890, previous to which year the Interstate Commerce Commission exerted little if any influence on the business, and also of the effect which the act of 1887 had through forbidding the pooling of freight in taking away an incentive to the building of new railroads.

II.

The constitution provides that Congress shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Acting thereunder Congress had at an early day legislated for the supervision of coasting vessels, and on the introduction of steamboats, in respect to them, even where plying solely on waters wholly within one state. But when Congress took over the supervision of railroads by passing the act of 1887, it expressly excepted from the provisions of that law transportation "wholly within one state." That Congress will eventually have to regulate this as well seems to me inevitable, even though many believe a constitutional amendment necessary to that end.

I am not a lawyer, and candor compels me to say that I have not met one member of that profession who believes as I do, that the power given to Congress to regulate commerce among the states carries with it everything which rises to the dignity of "commerce" as distinguished from "petty trade."<sup>1</sup> The lawyers tell me

<sup>1</sup>Since preparing this address I was, yesterday (April 10, 1908), privileged to read an address delivered by the Hon. Charles F. Amidon, Judge of the United States District Court for the District of North Dakota, before the American Bar Association, in Portland, Maine, last August, on "The Nation and the Constitution," from which I quote as follows:

"The severest critic of railroads cannot deny that their policy has been splendidly national, and the most potent single factor in the creation of our vast domestic commerce."

\* \* \* \* \*

"How far may the national government go in the control of those matters which have become in fact national? The situation fits exactly the terms of the resolution passed in the convention that framed the constitution, and which was the source of all the powers and restrictions embodied in that instrument. It presents a case 'to which the separate states are incompetent and in which the

that the question has been settled over and over again by the Supreme Court of the United States, beginning with the leading case of *Gibbons v. Ogden*, decided in 1824. I have recently read with some care the arguments in that case, and the opinion of the court by Chief Justice John Marshall, as well as the opinion of Mr. Justice William Johnson, in which the latter, while concurring in the judgment entered in the cause by his five associates, says that he reached the conclusion by different views on the subject. The words in the opinion of the court which are generally quoted are, "The completely internal commerce of a state, then, may be considered as reserved for the state itself." Undoubtedly those words are there, but as we will see shortly, the context of the opinion takes a broader view. The judgment of the court was that commerce covers navigation, including transportation, which service is at present performed by railways in utter disregard of state boundaries. All this seems to me as a layman to render the dictum of the court above quoted no longer literally binding. The court said (9 Wheaton, 187):

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said that they were sovereign, were completely

harmony of the United States may be interrupted by the exercise of individual legislation.' As to railroads there is no more reason why they should be subject to a divided authority than there is in the case of navigation. There will, of course, be in the one case as in the other, local matters that can be best dealt with by local authority. But as to all that affects them as commercial agencies, whether that commerce be local or interstate, the railroad is a unit; its activities are national, and it ought to be subject solely to national authority. Divided control is inefficient in protecting the public and grossly unjust in the burdens which it places upon the carrier. During the last winter there were passed in the states west of the Mississippi River one hundred and seventy-eight statutes dealing directly with transportation and its instrumentalities. The number of such statutes now in force throughout the entire country extends well into the thousands. They are conflicting, oppressive, inefficient. They seldom represent intelligent investigation, but in the main have had their origin in agitation, often in popular frenzy. State legislatures have not yet learned that due process of legislation, like due process of law, proceeds upon inquiry, and legislates only after hearing. Protection to the public and justice to the carrier alike unite in the demand for a single governmental control. The power under the commerce clause of the constitution is plain. The decisions of the Supreme Court have placed that subject beyond the realm of controversy. If the railroad as an instrument of commerce can only be dealt with justly and efficiently by a single authority the federal government may assert and maintain its exclusive jurisdiction. Regulation is now inefficient because divided. If the federal government shall take exclusive control, it will then be responsible alone for such a control as shall be both efficient and just."

independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

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The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; *and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."*

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. *It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.*

If this be the admitted meaning of the word, in its application to foreign nations, *it must carry the same meaning throughout the sentence, and remain a unit*, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. *Such a power would be inconvenient, and is certainly unnecessary.*

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those



internal concerns which affect the states generally; *but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.* The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. *The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it.* The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

*This principle is, if possible, still more clear when applied to commerce "among the several states."* They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? *Commerce among the states must, of necessity, be commerce with the states.* In the regulation of trade with the Indian tribes the action of the law, especially when the constitution was made, was chiefly within a state. *The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states.* The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power?

*It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.* This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms and do not affect the questions which arise in this case, or which have been discussed at the bar. *If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.* The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the

sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.

*The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be in any manner connected with "commerce with foreign nations, or among the several states, or with the Indian tribes."* It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

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*The sole question is, can a state regulate commerce with foreign nations and among the states while Congress is regulating it?*

The court then went on to show why a state cannot regulate commerce with foreign nations and among the states while Congress is regulating it.

It is the failure of Congress to also take over the internal commerce within one state which makes necessary the continued existence of state commissions. This, to my thinking, has greatly lessened and weakened the good which might have come to the nation, and to the railways as well, from a proper regulation by one central authority of the one thing "commerce among the several states."

Under its constitutional power, "to establish post-offices and post-roads," Congress long since established as post-roads "All railroads, or parts of railroads, which are now, or hereafter may be, in operation." This regardless of whether they cross state lines, or lie and are operated "wholly within one state." (See Revised Statutes, section 3964.)

### III.

The chief reason why more has not been accomplished by the Interstate Commerce Commission lies in the fact that the commission, being executive, or administrative, was, under the law of 1887, also given judicial powers, and under the act of 1906 has been given, in addition, the purely legislative power of fixing rates. The commission is greatly weakened and embarrassed by this mingling in its hands of the functions of each of the three branches of government, which the people, in establishing their constitution, so plainly ordained should forever be kept separate.

As if foreseeing what has taken place in our day, Washington, in his Farewell Address, said :

It is important, likewise, that the habits of thinking, in a free country, should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding, in the exercise of the powers of one department, to encroach upon another. *The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.* A just estimate of that love of power, and proneness to abuse it which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal, against invasions by the others, has been evinced by experiments, ancient and modern; some of them in our own country and under our own eyes. *To preserve them must be as necessary as to institute them.* If, in the opinion of the people, the distribution or modification of the constitutional powers be, in any particular, wrong, let it be corrected by an amendment in the way which the constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

Do not understand me as suggesting that the intelligent and honorable men who are and have been members of the Interstate Commerce Commission have attempted to usurp power, but only that all the other branches of government, and particularly the courts, look with disfavor upon the exercise by one body of these three functions of government.

Washington's plea to his fellow-countrymen on behalf of the constitution was addressed not only to their patriotism but to their pocketbooks. To guard against the despotic encroachments of one branch of government on the others is to-day our duty and our interest. But what are we as a nation doing in respect to the corporations which carry our domestic commerce by rail? Nearly every state has legislated and is legislating, not for the regulation of the railroads as a whole but selfishly in respect to those within its borders and chiefly in the direction of the curtailment of the profits of the business, and our National Congress is aiming to do the like. Congress has gone so far toward what Washington called creating a despotism as to authorize one body, the Interstate Commerce Commission, to exercise legislative, executive and judicial functions! Not satisfied with this it is seeking to restrict the

hours of labor; to take from the railroad companies (which the law requires to safely conduct their business) the right of selecting their employees, and to lessen among such employees the measure of care which they have heretofore exercised over the safety of the passengers and goods in their charge. What does fining a railroad corporation effect except to lessen the profit of the innocent stockholders and diminish the inducement to build new railroads, or extend and better old ones?

There is in the highest and truest sense "an indissoluble community of interest" between the nation and the railways. The real owners of the latter are our own people and as much entitled to the fostering protection of our laws, federal and state, as are any other individual citizens. That our courts are of this way of thinking is well known. One of the judges of the Supreme Court of the United States, Mr. Justice Brewer, in an opinion rendered a fortnight ago, in the case of *Interstate Commerce Commission v. Chicago and Great Western Railway*, said:

It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in *Int. Com. Com. v. Ala. Mid. R. R. Co.*, 168 U. S. 144, 172, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this court, in *Int. Com. Com. v. B. & O. R. R. Co.*, 43 Fed. Rep. 37, 50:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the Interstate Commerce Act—*Armour Packing Co. v. The United States*, *ante*,—and also that in fixing their own rates they may take into account competition with other carriers, provided only that the competition is genuine and not a pretense. (Citing authorities.)

It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent

and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers.

It is high time that our legislatures, federal and state, should call a halt and consider the real interest of our whole people. That there is much of wrong in railroad management I am free to admit. But now that rebating and other discriminations have been stopped, not at all through the passage of new laws but through the enforcement of old ones, the wrong is no longer to the public, but consists almost entirely of frauds committed by the managers,—presidents and directors,—on the stockholders who have irrevocably dedicated their private means to a public use. Against breaches of trust committed by officers and directors, on their stockholders, the common and the statute laws provide abundant remedies. But in the administration of those laws practices have grown up, which make it almost impossible for the minority to assert and maintain their rights against a majority in power.

As I said here, in Philadelphia, a year ago, in an address before the Wharton School of Finance and Commerce of the University of Pennsylvania, "No railroad fortune was ever made through enhancing rates, oppressing shippers, or withstanding the general tendency of rates to decrease. And what is more, every dishonest railroad fortune has been made, not by oppressing shippers, but through robbing the stockholders. Should you ask why these stockholders have not sued for restitution, I would remind you of the cost and delay of such litigation, and of the fact that if restitution should be made, it would be to the corporation, of which in all probability the same persons would remain in control, as the majority holders and as officers and directors, so that the funds restored would simply revert to their custody and their tender mercy."

It has been shown that the increase in the wealth per capita has grown with the growth of our railroad mileage. The nation and the railways to-day confront a period of depression in which

each needs to husband all its resources. Not long after the Civil War a distinguished Southern Senator, later known as Mr. Justice Lamar of the Supreme Court, in his epoch-making eulogy on Charles Sumner, said, "My countrymen, come to know one another and you will come to love one another." Can we do better than to hope that through discussions such as we are having to-day, the nation and the railways may come "to know one another and to love one another" for the mutual good of both?